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No. 86-600

IN THE

Supreme Court of the United States

October Term, 1986

ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,
Petitioners,

against

LEE STERLING and THOMAS LAPIANA,
Respondents,

and

HOUSING COUNCIL OF NEW YORK, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Questions Presented.

When a United States Court of Appeals has held that a "nail and mail" notice statute was unconstitutional as applied to absentee landlords because it required notices of sanitation violations to be posted in and mailed to premises where the landlords did not reside, and when the record shows both that a large number of the mailed notices were returned undelivered and that the posted notices frequently disappeared before the landlords could discover them, should this Court grant a Writ of Certiorari to review the case, even though the "nail and mail" procedures were widely abused, the "nail and mail" statute was amended almost two years before it was declared unconstitutional, and petitioners seek only to collect thousands of default judgments that were obtained pursuant to their former procedures?

When petitioners for a Writ of Certiorari ask this Court to review an issue that could not arise in their case unless this Court rejected findings of fact that were made by a United States Magistrate and adopted by a United States Court of Appeals, should this Court review that issue?

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BRIEF IN OPPOSITION.

Statement of the Case.

This case concerns New York City's former "nail and mail" procedure for issuing notices of sanitation violations to absentee owners of multiple occupancy dwellings. By a 1979 amendment to the New York City Charter, Sanitation Enforcement Agents (SEA's) were authorized to post notices of violation in premises at which violations occurred, and to mail copies of the notices to those premises. *See* Chapter 623 of the New York Session Laws of 1979. The "nail and mail" procedure was used almost exclusively for multiple occupancy dwellings. *See* Department of Sanitation Memoranda, October 2, 1981 and December 12, 1981. (Joint Appendix 2d Cir. p. 60-61).

Since many absentee owners of multiple dwellings do not receive mail at the dwellings they own, and since by definition they do not reside there, the "nail and mail" notices very frequently failed to reach them. *See Sterling v. Environmental Control Board of the City of New York,* 793 F.2d 52, 57 (2d Cir. 1986). As the United States Court of Appeals for the Second Circuit pointed out in this case, " 'in New York City, paper notices affixed to [multiple dwellings] have a very short life span.' " *Sterling v. Environmental Control Board of the City of New York,* 795 F.2d 8, 9 (2d Cir. 1986) (on Petition for Rehearing) (quoting Report of United States Magistrate Caden). Furthermore, because so many landlords did not receive mail at their multiple dwellings, "[a] substantial number of the 'mailed' notices were returned as undelivered." *See Sterling;* 793 F.2d at 57 (2d Cir. 1986). Although New York City required absentee owners to register their business addresses with the city, *see* N.Y.C. Administrative Code §D26-41.03, the "nail and mail" statute did not require

notices to be mailed to those addresses. *See* Chapter 623 of the New York Session Laws of 1979.

The "nail and mail" procedures were widely abused. The Second Circuit described their operation as follows:

> The October, 1980, Inspector General's report found that SEA's operated under a "guideline" that 20 summonses be issued daily, without regard to the type of service used. Because the SEA's found the nail and mail process entailed less work than personal service, perhaps over 90 percent of summonses were issued by that method. Further, many SEA's issued their daily quota of citations during the morning hours, writing afternoon times on some of the violation forms to create the appearance of day-long work. This particular abuse was facilitated by the use of nail and mail because no one on the spot could challenge the incorrect time written on the posted notice. More that half (58.3%) of the SEA's observed had engaged in this activity at some point during the Inspector General's survey. Because nail and mail was so easy, some SEA's bypassed violations at buildings where personal service would be necessary, and then issued a nail and mail summons to an adjacent building.

Sterling, 793 F.2d at 55 n.2.

Respondents Lee Sterling and Thomas LaPiana are absentee owners of multiple occupancy dwellings in New York City who were served with notices of violation by "nail and mail." Petitioner Environmental Control Board (ECB) entered default judgments against them, and increased the amount of those judgments sixfold by adding

default penalties. Sterling and LaPiana allege that they never received notice of the proceedings against them.

As a general practice, the ECB did not reopen default judgments when a defendant alleged a lack of notice, and they did not monitor the mailed notices that were returned undelivered. *See id.* at 57. It is striking that even after the District Court in this case ordered the ECB to reopen the default judgments against Sterling, the ECB refused to accept lack of notice as a defense. *See id.* at 57 n.3. As the Second Circuit explained, the ECB left defendants "to prov[e] the negative of non-receipt by oral testimony because [they] assumed that if the 'mailed' notice was not delivered, the 'nailed' notice would suffice." *Id.* at 57.

Respondents Sterling and LaPiana initiated this suit on July 3, 1980 under 42 U.S.C. §§ 1983, 1985, and 1988 and New York Civil Rights Law §11 to challenge the constitutionality of the "nail and mail" statute both on its face and as applied. The Housing Council of New York, Inc., an umbrella organization representing groups of landlords of multiple occupancy dwellings in New York City, intervened in this action on November 4, 1980.

This case was heard over a period of four years before the United States District Court for the Eastern District of New York. In 1982, an advisory jury found that the "nail and mail" process was not fairly designed and applied to give notice to defendants, that SEA's did not attempt with due diligence to effect personal service, and that the ECB's procedures were not "fair and reasonable." *See* Petitioners' Appendix at 50-51. However, an October 3, 1983 Report by United States Magistrate Caden upheld the constitutionality of the "nail and mail" statute, relying on changes in the Department of Sanitation's and the ECB's

procedures that were instituted in 1982. Sterling and La-Piana moved to vacate the Magistrate's report, but Chief Judge Weinstein denied that motion on the condition that petitioners took steps to amend the statute. *See id.* at 38-43. The statute was amended effective August 6, 1984. *See Sterling,* 793 F.2d at 56; Chapter 944 of the New York Session Laws of 1984. Chief Judge Weinstein then adopted Magistrate Caden's report, declared the "nail and mail" statute constitutional, and "closed the case" in an order dated February 27, 1985. *See* Petitioner's Appendix at 30-47.

The United States Court of Appeals for the Second Circuit reversed Chief Judge Weinstein's order and unanimously held that "the 1979 statute was unconstitutional as applied to absentee owners of multiple dwelling housing units against whom default judgments were entered." *Sterling,* 793 F.2d at 58. The court stated that, "we regard the 'nailed' notice as wholly unreliable with regard to absentee landlords" because "[n]otices posted on exterior doors of urban multiple residences may well disappear quickly due to forces human or natural, and absentee landlords are likely never to learn of such a notice." *Id.* at 56-57. The court also found the "mailed" notice inadequate because it was not mailed "to the business address of the property owner," but rather to the address of the premises, where "many landlords do not receive mail." *Id.* at 57. In consequence, the court stated, "the evidence shows that the mailed notices frequently did not reach the landlords" and "[a] substantial number of the 'mailed' notices were returned as undelivered." *Id.* Although petitioners claimed that they remedied the constitutional inadequacy of the "nail and mail" procedure by sending extrastatutory second mailings when a search of computer files revealed a business address for absentee landlords,

the court found that the computer files were incomplete, and that the second mailing procedure was not fully implemented until roughly the time when the statute was amended. *See id.* at 55, 58 n.4.

On June 19, 1986, petitioners filed a petition for rehearing with the Second Circuit. Relying on an ordinance requiring owners of large multiple dwellings to provide janitors who live nearby, they urged that court to limit its "declaration of unconstitutionality . . . to absentee-owners of multiple dwellings [containing] less than nine residential units." Petition for Rehearing at 8. The Court of Appeals unanimously rejected defendants' argument as "without merit," and emphasized that the ordinance cited by petitioners had not been brought to their attention before. They also pointed out that the ordinance did not require on-site janitors, and that the presence of an on-site janitor would only marginally improve the chances that notice would be received because the lifespan of posted notices in New York was so short. *See Sterling,* 795 F.2d at 9.

Reasons for Denying the Writ.

Petitioners do not seek to reinstate the "nail and mail" statute that was invalidated in this case. *See* Petition at 16-17. That statute was amended almost two years before it was declared unconstitutional,[1] and petitioners contended before the Second Circuit that the former statute was "irrelevant." *See Sterling v. Environmental Control Board of the City of New York,* 793 F.2d 52, 56. Rather,

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[1]Pursuant to a conditional order by Chief Judge Weinstein, petitioners took steps to amend the statute, and the amendment was enacted into law on August 6, 1984. *See,* Petitioners' Appendix at 38-43; Chapter 944 of the New York Session Laws of 1984.

petitoners seek only to enforce the thousands of default judgments that they obtained against absentee landlords pursuant to their former "nail and mail" procedures.[2] *See* Petition at 16-17. Since this case concerns a straightforward application of this Court's precedents in *Mullane v. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Greene v. Lindsey*, 456 U.S. 444 (1982), and since petitioners raise no legal issues that require this Court's attention, the Petition for Certiorari should be denied.

I. The Second Circuit's Opinion Correctly Applied this Court's Precedents and Based its Decision on Sound Considerations of Policy.

This case presents a straightforward application of this Court's precedents requiring that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Neither petitioners' "nailed" notice nor their "mailed" notice was reasonably calculated to reach absentee landlords, because the statute required both notices to be delivered to an address at which the landlords did not reside. As the advisory jury impaneled by the District Court found, SEA's did not attempt "with due diligence . . . to effect personal service," and petitioners' "nail and mail" service of process was not "fairly designed and applied to give notice." *See* Petitioners' Appendix at 50.

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[2]It is worth noting that, even if petitioners' legal contentions were accepted, their default judgments would remain subject to constitutional attack because the Second Circuit "[did] not reach the issues raised by the enforcement abuses in the early period" of the "nail and mail" statute's operation. *See Sterling*, 793 F.2d at 56.

The Second Circuit determined that petitioners' " 'nailed' notice [was] wholly unreliable with regard to absentee landlords" because "[n]otices posted on exterior doors of urban multiple residences may well disappear quickly due to forces human or natural, and absentee landlords are likely never to learn of such a notice." *Sterling v. Environmental Control Board of the City of New York*, 793 F.2d 52, 56-57. In *Greene v. Lindsey*, 456 U.S. 444 (1982), this Court invalidated a statute allowing notices of eviction proceedings to be posted on tenants' doors because the notices "were 'not infrequently' removed by children or other tenants before they could have their intended effect." *See, id.* at 453. In the instant case, the Second Circuit held that "[t]he likelihood that the posted notices . . . will reach the intended recipient is less than in *Greene*, because owners such as [respondents] do not live on the premises." *Sterling*, 793 F.2d at 57.

Moreover, the inadequacy of the posted notice was not remedied by the mailed notice: the "nail and mail" statute required notice to be mailed only to the address of the premises where an alleged sanitation violation occurred, a place where, by definition, absentee landlords did not reside. In consequence, "the mailed notices frequently did not reach the landlords," and large numbers were returned to the ECB undelivered. *See id.* The inadequacy of petitioners' procedure is particularly striking because, although landlords were required to register their business addresses with the City, *see* N.Y.C. Administrative Code §D26-41.03, the "nail and mail" statute did not require petitioners to mail notices to those addresses. *See* Chapter 623 of the New York Session Laws of 1979.

The Second Circuit based its decision in this case on sound considerations of policy. As this Court stated in

Fuentes v. Shevin, 407 U.S. 67 (1972), "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' " *Id.* at 80 (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863)). Furthermore, the record in this case "revealed widespread abuse of the nail and mail process." *See Sterling*, 793 F.2d at 55 & n.2. That abuse made the ECB's presumption that "nail and mail" service gave defendants actual notice manifestly unjust. *See Sterling*, 793 F.2d at 57n.2.

Contrary to petitioners' argument, "nail and mail" service of sanitation violations presents no analogy to the posting of parking tickets on car windshields. *See* Petition at 18, 27. Multiple occupancy dwellings, unlike cars, are immobile, and the owners of multiple dwellings *can* conveniently be served by alternative means. Indeed, the amended "nail and mail" statute now requires either personal service upon a building's caretaker or a supplementary second mailing to an absentee owner's correct address. Petitioners do not claim that this has proved unduly inconvenient.

Apparently, petitioners do not challenge the Second Circuit's holding that the "nail and mail" statute was unconstitutional. They challenge only the application of that holding to absentee owners of multiple dwellings containing nine or more units. *See id.* at 1, 22-27. They claim that "nail and mail" notice was more likely to reach those owners because a New York ordinance requires a janitor to "reside in or within a distance of one block or 200 feet from the dwelling, whichever is greater." *See id.* at 22-27; N.Y.C. Administrative Code §D26-22.05.

On Petition for Rehearing, the Second Circuit unanimously rejected that argument as "without merit," and emphasized that the quoted ordinance had not been brought to their attention before. *See Sterling v. Environmental Control Board of the City of New York*, 795 F.2d 8, 9 (on Petition for Rehearing). The court pointed out that "the newly-cited ordinance requires only that a janitor live in the same block," not in the dwelling itself, and that even an on-site janitor "only marginally improves the chances" that notice will be received, because, " 'in New York City, paper notices affixed to [multiple dwellings] have a very short life span.' " *See Id.* (quoting Report of United States Magistrate Caden). The court also stated that petitioners' argument "might carry weight had the [statute] provided, as [it] might easily have done, that the 'nailed' summons be given directly to the superintendent or the janitor in a multiple dwelling. It contained no such requirement, however." *Id.*

II. The ECB's Extrastatutory Second Mailings were Instituted too Late to Remedy the "Nail and Mail" Statute's Constitutional Inadequacy.

Having failed to show any conflict between the Second Circuit's holding and this Court's prior decisions, petitioners ask this Court to review a subsidiary issue that simply does not arise in this case. They repeat their claim, rejected below, that they remedied the "nail and mail" statute's constitutional inadequacy by sending extrastatutory second mailings to absentee landlords. *See* Petition at 31-32. *Compare Sterling*, 793 F.2d at 55, 58 n.4. They then argue that the Second Circuit unduly extended this Court's long-standing precedent that extrastatutory measures cannot remedy an unconstitutional notice statute, *see Wuchter v. Pizzutti*, 276 U.S. 13, 24 (1928), to cases

holding notice statutes unconstitutional as applied.[3] *See* Petition at 30-36. Petitioners' argument misrepresents both the Second Circuit's opinion and the record of this case.

The Second Circuit's reference to *Wuchter* was not essential to its holding. *Wuchter* would have been relevant to this case only if the ECB actually sent second mailings to all absentee owners during the period before the "nail and mail" statute was amended. *See Sterling*, 793 F.2d at 58 n.4. But the Second Circuit found, relying on Magistrate Caden's report, that "second mailings were not made to all absentee landlords until 1984." *See id.* at 55. Accordingly, the court stated explicitly that, "[s]ince the full implementation of [the extrastatutory second mailing] policy appears to have coincided roughly with the amendment requiring such a mailing, it cannot affect our ruling." *Id.* at 58 n.4.

Despite the Second Circuit's statements that the second mailings were implemented too late to remedy the "nail and mail" statute, petitioners seek to relitigate the facts of

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[3]Petitioners also claim that *Wiren v. Eide*, 542 F.2d 757, 762-63 (9th Cir. 1976), holds that *Wuchter* has been "overruled." *See* Petition at 32-33. That claim is incorrect. *Wiren* holds only that a defendant who received actual notice lacks standing to challenge the constitutionality of a notice statute, and that when a defendant has received actual notice, *Wuchter* should be interpreted "in light of" the principle of judicial self-restraint. *See Wiren*, 542 F.2d at 762-63. In the instant case, of course, there is absolutely no evidence that Sterling or LaPiana received timely notice of the sanitation violations with which they were charged. Furthermore, petitioners' argument that Sterling and LaPiana should be denied standing to challenge the constitutionality of a notice statute on the grounds that they "are members of a group who regularly received actual notice" would overrule a long line of this Court's precedents stretching back to *Pennoyer v. Neff*, 95 U.S. 714 (1877).

this case. They repeat their claim that "a second mailing was made to all persons similarly-situated to plaintiffs." *See* Petition at 31-32. And as support for that claim, they rely on a single affidavit alleging that it was "the responsibility of the Summons Control Unit" to send second mailings when a search of computer files provided a landlord's correct address. *See id.* at 9-10. Crucially, however, that affidavit does *not* allege that the computer files were complete or up to date. *See id.*

In October, 1983, Magistrate Caden found that the computer files searched by the ECB were neither complete nor up to date: the files "[did] not contain a record of the name and address of the owner or managing agent for every [multiple occupancy dwelling] in the City. Nor [were] all of the names and addresses on file maintained in computer memory." Magistrate Caden's Report, October 3, 1983, at 27. Petitioners' affidavit is hardly a sufficient basis for asking this Court to reject the factual findings of a United States Magistrate, especially when those findings have been adopted by a United States Court of Appeals. *See Sterling,* 793 F.2d at 55, 58 n.4.

Thus the scope of this Court's holding in *Wuchter* has no bearing on the instant case, because petitioners failed to provide notice reasonably calculated to reach absentee landlords, even taking the second mailings into account. However, petitioners' failure to provide adequate notice does constitute a perfect illustration of this Court's rationale in *Wuchter. Wuchter* held that extrastatutory measures cannot remedy an unconstitutional statute because "[a] provision for service that leaves such a clear opportunity for the commission of fraud or injustice is not a reasonable provision." *Wuchter,* 276 U.S. at 19 (citation omitted). In the instant case, the widespread abuse of the

"nail and mail" procedure and the large number of default judgments that petitioners seek to collect demonstrate clearly the fraud and injustice that can result when a legislature fails to consider all of the groups to whom a notice statute will be applied. Petitioners claim that extending *Wuchter* to statutes unconstitutional as applied would discourage state and local governments from employing extrastatutory measures when a notice statute is "of doubtful validity." *See* Petition at 30-31, 33. But, as the record of this case shows, state and local governments should be deterred from *enacting* statutes of doubtful validity, not encouraged to add extrastatutory procedures to invalid statutes.

Conclusion.

The Petition for a Writ of Certiorari should be denied. This case concerns a straightforward application of this Court's precedents to a statute that had already been amended, and petitioners raise no legal issues that merit this Court's attention.

Respectfully submitted,

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